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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-439

THE PEOPLE OF THE TERRITORY OF GUAM,
Petitioners,

vs.

EDMUND J. OLSEN,
Respondent.

BRIEF FOR PETITIONERS THE PEOPLE OF THE TERRITORY OF GUAM

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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CASE BELOW

This case has not yet been officially or unofficially reported in the courts below.

JURISDICTIONAL GROUNDS

This case comes before this court upon the granting of a Writ of Certiorari by this court to the Ninth Circuit Court of Appeals. Jurisdiction of this court is invoked pursuant to 28 USC §1254(1) and Rule 19(1)

(b) of the Rules of this court, to review an opinion of the Ninth Circuit which has rendered a decision deciding an important territorial question in a manner to conflict with territorial law by declaring said law contrary to the Organic Act of Guam (48 USC §1421, et seq.) and in a manner which conflicts with a previous ruling of this court. Jurisdiction lay with the Ninth Circuit Court of Appeals pursuant to 28 USC §1291.

STATUTES INVOLVED

Federal law interpreted by the Ninth Circuit, and upon which the determination of this case rests, is §22 of the Organic Act of Guam (48 USC §1424) which reads, in pertinent part:

> "Section 22. (a) There is hereby created a Court of Record to be designated the 'District Court of Guam', and the judicial authority of Guam shall be vested in the District Court of Guam and in such court or courts as may have been or may hereafter be established by the laws of Guam. The District Court of Guam shall have the jurisdiction of a District Court of the United States in all causes arising under the Constitution, treaties and laws of the United States, regardless of the sum or value of the matter in controversy, shall have original jurisdiction in all other causes in Guam, jurisdiction over which has not been transferred by the Legislature to other court or courts established by it, and shall have such appellate jurisdiction as the Legislature may determine. The jurisdiction of and procedure in the courts of Guam other than the

> District Court of Guam shall be prescribed by the laws of Guam."
>
> "Appeals to the District Court of Guam shall be heard and determined by an Appellate Division of the court consisting of three judges, of whom two shall constitute a quorum. The judge appointed for the court by the President shall be the Presiding Judge of the Appellate Division and shall preside therein unless disqualified or otherwise unable to act. The other judges who are to sit in the Appellate Division at any session shall be designated by the Presiding Judge from among the judges assigned to the court from time to time pursuant to §24(a) of this Act. The concurrence of two judges shall be necessary to any decision by the District Court of Guam on the merits of an appeal but the Presiding Judge alone may make any appropriate orders with respect to an appeal prior to the hearing and determination thereof on the merits and may dismiss an appeal for want of jurisdiction or failure to take or prosecute in accordance with the applicable law or rules or procedures."

Also involved, but as an aid to interpretation, is the "Covenant to establish a Commonwealth of the Northern Mariana Islands in political union with the United States of America", Article II §203(d) and Article IV, Sections 402 and 403 (Public Law 94-241; 90 Stat. 265-267), which reads:

> "Article II
>
> Constitution of the Northern Mariana Islands
>
> Section 203(d). The judicial power of the Northern Mariana Islands will be vested in such

courts as the constitution or laws of the Northern Marianas may provide. The constitution or laws of the Northern Mariana Islands may vest in such courts jurisdiction over all causes in the Northern Mariana Islands over which any court established by the Constitution or laws of the United States does not have exclusive jurisdiction."

"Article IV

Judicial Authority

"Section 401. The United States will establish for and within the Northern Mariana Islands a Court of Record to be known as the 'District Court of the Northern Mariana Islands.' The Northern Mariana Islands will constitute a part of the same judicial circuit of the United States as Guam.

Section 402. (a) The District Court for the Northern Mariana Islands will have the jurisdiction of a District Court of the United States, except that in all causes arising under the constitution, treaties or laws of the United States it will have jurisdiction regardless of the sum or value of the matter in controversy.

(b) The District Court will have original jurisdiction in all causes in the Northern Mariana Islands nor described in subsection (a) jurisdiction which is not vested by the constitution or laws of the Northern Mariana Islands in a court or courts of the Northern Mariana Islands. In causes brought in the District Court solely on the basis of this subsection, the District Court will be considered a Court of the Northern Mariana Islands for the purposes of determining the

requirements of indictment by Grand Jury or trial by jury.

(c) The District Court will have such appellate jurisdiction as the constitution or laws of the Northern Mariana Islands may provide. When it sits as an Appellate Court, the District Court will consist of three judges, at least one of whom will be a judge of a Court of Record of the Northern Mariana Islands.

Section 403. (a) The relations between the courts established by the constitution or laws of the United States of the Court of the Northern Mariana Islands with respect to appeals, certiorari, removal of causes, the issuance of writs of habeas corpus and other matters or proceedings will be governed by the laws of the United States pertaining to the relation between the courts of the United States and the courts of the several states in such matters and proceedings, except as otherwise provided in this article; provided that for the first fifteen years following the establishment of an Appellate Court of the Northern Mariana Islands the United States Court of Appeals for the judicial circuit which includes the Northern Mariana Islands will have jurisdiction of appeals from all final decisions of the highest court of the Northern Mariana Islands from which a decision could be had in all cases involving the constitution, treaties or laws of the United States, or any authority exercised thereunder, unless those cases are reviewable in the District Court for the Northern Mariana Islands pursuant to subsection 402(c).

(b) Those portions of Title 28 of the United States Code which apply to Guam or the District

Court of Guam will be applicable to the Northern Mariana Islands or the District Court for the Northern Mariana Islands, respectively, except as otherwise provided in this article."

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Organic Act of Guam Section 22 (48 USC §1424), using acceptable rules of statutory interpretation and legislative intent (where ascertainable) gives to the Territory of Guam sufficient powers of self-government so as to permit its legislature to create an Appellate Court separate from the Appellate Division of the District Court of Guam to which all appeals from the Superior Court of Guam, also created by the Legislature of Guam, are to be directed, to the exclusion of the Appellate Division of the District Court of Guam as a court in the appeals chain for local cases heard in local courts.

STATEMENT OF THE CASE

On September 11, 1975, Edmund J. Olsen was convicted of receiving, concealing and withholding stolen property; burglary in the second degree (two counts); and assault with a deadly weapon, judgment being entered against him on November 4, 1975, at which time he was sentenced. On October 28, 1975, Edmund J. Olsen filed a Notice of Appeal to the District Court of Guam and to the Supreme Court of Guam from the jury verdict of guilty which was

handed down on September 11th. (See Appendix page A-1). On March 9th, Judge Cristobal C. Duenas, District Judge, acting as Presiding Judge of the Appellate Division of the District Court of Guam, dismissed the appeal of Defendant Olsen (Appendix page A-2). Thereupon, Defendant appealed to the United States Court of Appeals for the Ninth Circuit from the dismissal entered in the Appellate Division of the District Court (Appendix page A-3). The Ninth Circuit Court then ordered (Appendix page A-11) that the case be heard en banc without further briefs or arguments (briefs having been filed, but no argument held in this case at that time), after which the court rendered its opinion declaring the laws of Guam giving jurisdiction of such appeals to the Supreme Court of Guam contrary to the Organic Act of Guam (Appendix page A-12). From this opinion, the petition for a Writ of Certiorari was sought by the Territory of Guam, which has been granted.

The decision of the Ninth Circuit Court en banc dealt with the sole question of jurisdiction of the District Court of Guam and the Supreme Court of Guam and overruled the previous case of *Agana Bay Development Company (Hongkong) Ltd. v. Supreme Court of Guam,* No. 75-1059 (529 F.2d 952). The *Agana Bay* case had upheld the power of the Legislature of the Territory to create a Supreme Court of Guam. No issue pertaining to the Respondent's criminal conviction is raised either by the appeal to the Ninth Circuit or by this case.

ARGUMENT

I

THE STRUCTURE AND LEGISLATIVE HISTORY OF SECTION 22 OF THE ORGANIC ACT OF GUAM (48 USC 1424) FAIRLY INDICATES THAT CONGRESS, AFTER ESTABLISHING A BASIC COURT SYSTEM, LEFT ITS DEVELOPMENT UP TO THE PEOPLE OF GUAM.

As first enacted in 1950, Section 22 of the Organic Act (48 USC 1424) established "the judicial authority of Guam" and established the jurisdiction of the District Court of Guam. The "judicial authority of Guam" was vested in *both* the District Court of Guam *and* "in such court or courts as may have been or may hereafter be established by the laws of Guam." (48 USC §1424). From this statement, it is evident that the court or courts which may have been, or may be in the future, established by the laws of Guam share with equal dignity the "judicial authority of Guam." Congress has not set up, in this sentence, a system of superior and inferior courts for the territory.

A comparison of the above language and that found in the revised Organic Act of the Virgin Islands is instructive. The equivalent sentence in the revised Organic Act of the Virgin Islands states:

> "The judicial power of the Virgin Islands shall be vested in a Court of Record to be designated the 'District Court of the Virgin Islands', and in such court or courts of inferior jurisdiction as may have been or may hereafter be established by local law." (48 USC §611).

There can be no question that the Virgin Islands are not permitted to create a court having equal dig-

nity with the District Court of the Virgin Islands. This is not the case with Guam as the Organic Act of Guam (as enacted in 1950), continues with:

> "The District Court of Guam shall have the jurisdiction of a District Court in the United States in all causes arising under the constitution, treaties and laws of the United States, shall have original jurisdiction in all causes in Guam, jurisdiction over which has not been transferred by the Legislature to other court or courts established by it, and shall have such appellate jurisdiction as the Legislature may determine." (48 USC 1424).

On the other hand, the Organic Act of the Virgin Islands (48 USC 1612) grants to that District Court general original jurisdiction in all other causes in the Virgin Islands, "exclusive jurisdiction over which is not conferred by this chapter, Sections 104 and 111 of this title, and section 3350(c) of Title 26 upon the inferior courts of the Virgin Islands." In addition, the District Court of the Virgin Islands may, when it is "in the interest of justice" transfer to itself an action or proceeding brought in an inferior court. Further, the District Court may have appellate jurisdiction to review the judgment of the inferior courts of the Virgin Islands.

It is not an oversight that such a provision was not placed in the original Organic Act of Guam by Congress. Similar provisions were contained in the draft of the Organic Act provided to the Senate by the Department of Interior in 1949. Of the draft Organic Act, the Department has this to say:

"The judicial branch would consist of a Supreme Court, with a single justice appointed by the President, with the advice and consent of the Senate for a six year term, and of such *inferior courts* as the Legislature might create. The judicial district of Hawaii would be extended to include Guam so that the United States District Court for the district of Hawaii would have jurisdiction over certain cases arising in Guam. It would review final judgments of the Supreme Court of Guam in certain classes of cases." (emphasis added) (*Legislative History,* to U.S. Cong. Serv. '50, page 2847).

In committee, the Senate changed this draft to provide for a District Court of Guam having federal jurisdiction and such local jurisdiction as the Legislature of Guam had not transferred to local courts. The final version accepted by the Senate was suggested by Judge Albert B. Meris, who proposed these changes in a letter to the Senate which stated, in part:

"Furthermore, I suggest that the sounder legislative approach to the jurisdictional question involved in the section would be to confer upon the District Court original jurisdiction in all federal causes and in all other causes in Guam except such as the Legislature may assign to other courts." (2 U.S. Cong. Serv., '50, page 2853).

While this version of the Organic Act was adopted for Guam, again Congress consciously did not adopt this proposal for the Virgin Islands. The Department of Interior, in presenting its proposal, disagreed

with the concept that all local cases could be transferred to courts created by the Virgin Islands. In this respect, the Department stated:

"The Chamber of Commerce Bill and the Legislative Assembly Bill, unlike the Department (of Interior) Bill would retain the provision of the present Organic Act authorizing the Legislature to establish a Superior Court and to transfer to it from the District Court jurisdiction over alll causes other than those arising under the laws of the United States." (2 U.S. Code Cong. & Adm. News—'54, pages 2599-2600).

Judge Albert Meris, being a judge of the Third Circuit Court of Appeals, commented extensively upon its Virgin Islands Organic Act as the Virgin Islands were within his circuit. Unlike his recommendations with regards to Guam, Judge Meris believed that the District Court should be able to transfer "specific cases from an inferior court to the District Court for trial and determination." The judge believed that the inferior courts of the Virgin Islands were incapable of handling test cases of great importance. He comments further by saying:

"Otherwise the local legislature might, by conferring jurisdiction upon the inferior courts in much more serious classes of cases, deprive the District Court of jurisdiction which *you intend* that it shall have and which under accepted standards of judicial administration it ought to retain." (emphasis added) (2 U.S. Code Cong. & Adm. News—'54, page 2607).

Judge Meris then comments that, like Guam, there should be concurrent jurisdiction with the District Court and the inferior courts of the Virgin Islands. However, with regards to the Virgin Islands, Judge Meris provided suggested amendments to the law which vary in significant and substantial detail from those of the Organic Act of Guam (supra, page 2607). Judge Meris' suggestions were later adopted into law.

Immediately following the adoption of the Organic Act of Guam, the First Guam Legislature, in Public Law 77, created the Appellate Division of the District Court and provided for appeals to that court. Public Law 77 of the First Guam Legislature went on to state that appeals should be heard by three judges, chosen from among the judges who could sit on the District Court and who could be appointed by the Chief Justice of the United States. (See *Corn v. Guam Coral Co.*, 318 F.2d 622, 624 (1963)). Pursuant to this law, Appellate Judges from the District Court of Hawaii sat as part of the Appellate Division of the District Court of Guam.

Because this proved to be cumbersome, Congress, in 1958, amended the Organic Act of Guam (48 USC 1424) to provide the procedure for the Appellate Division and a better method of appointing Appellate Judges for it. Of this amendment, Judge Albert B. Meris, in a letter to the Chairman of the House Committee on Interior and Insular Affairs in support of HR 4215 which would add the second paragraph to 48 USC 1424, stated:

"Section 22(a) of the Organic Act of Guam also provides that the District Court shall have such appellate jurisdiction as the Legislature may determine. The local Judiciary Act, Public Law 117, First Guam Legislature, 1951, which was passed when I was out there, conferred upon the District Court broad appellate jurisdiction to review the decisions of the Island Court of Guam, an inferior court established under the prior naval rule which was continued by that act with municipal, domestic relations and probate court jurisdiction. In line with the Guamanian request for a procedure in which appeals would be considered by a court of three judges, which, as they pointed out, is the traditional American method, the local act provided for an Appellate Division of three judges, the regular judge of the court and two other judges to be assigned to the court by the Chief Justice of the United States under section 24(a) of the Organic Act. This Appellate Division has functioned heretofore by the assignment to it by the Chief Justice of the two District Judges from Hawaii. See *Eiban vs. Government of Guam,* (115 F.Supp. 519).

"Section 2 of the Bill would incorporate into Section 22(a) of the Organic Act an additional paragraph recognizing and making suitable procedural provisions for the Appellate Division of the District Court as it now exists under the local law. This would eliminate any doubt as to the status of the Appellate Division and would make it available to be designated hereafter as the Appellate Court for the Trust Territory of the Pacific Islands, a course which would seem logi-

cal and in the public interest, . . ." (2 U.S. Code Cong. & Adm. News—'58, p. 2629)

That amendment consisted of, among other things, the second paragraph of 48 USC 1424(a) and is to be found on page 3 of this brief. The Senate Report, No. 1582, states the intention of this additional paragraph to be:

> "an additional paragraph recognizing and making suitable procedural provisions for the Appellate Division of the District Court as it now exists under the local law. Presently, under Guam law (Public Law 17, First Guam Legislature, 1951) the District Court of Guam has broad appellate jurisdiction to review the decisions of the Island Court of Guam, an inferior court established under the prior naval rule and which has municipal, domestic relations and probate court jurisdiction. Existing Guam law provides for an Appellate Division of three judges, the regular judge of the court and two other judges to be assigned by the Chief Justice of the United States. Thus far the Chief Justice has assigned two District Judges from Hawaii as occasion demands it. Section 2 also establishes procedures under which the Appellate Division of the District Court of Guam shall operate." (2 U.S. Code Cong. & Adm. News—'58, pp. 2623-4).

Therefore, it is evident from reading the plain language of Section 22(a) of the Organic Act (48 USC 1424), a comparison between it and the revised Organic Act (48 USC 1424), a comparison between it and the revised Organic Act of the Virgin Islands, especially 48 USC 1612, and of the respective legislative histories of these acts, that the Congress of the United States intended that the jurisdiction allowed to the courts of Guam be different and greater than that allowed to the courts of the Virgin Islands. The local courts of Guam share an equal measure of the judicial authority of Guam with the District Court of Guam. The only exclusive jurisdiction granted to the District Court of Guam is that of federal matters and the territorial income tax. There is no hint of the legislative history of the 1958 amendment to the Organic Act of Guam (Public Law 85-444, Section 21, 72 Stat. 179, 1958, 48 USC 1424(a), as amended) that this legislation was designed to remove the power of the local Guam Legislature to decide what appellate jurisdiction, if any, lay with the District Court of Guam. Rather, it appears that Congress was reacting to a need which was made manifest by the actions of the First Guam Legislature.

II

THE ENTIRE HISTORY OF THE ORGANIC ACT OF GUAM SHOWS THAT CONGRESS HAS REACTED TO, RATHER THAN ANTICIPATED, ACTS OF THE GOVERNMENT OF GUAM.

Only one year after passage of the Organic Act, Congress realized that it had not properly anticipated the effects of Guam granting extensive appellate jurisdiction to the Appellate Division of the District Court. In reaction to Public Law 17 of the First Guam Legislature, and to correct the Organic Act to be in conformance with that procedure, Congress

adopted Section 48 of Public Law 248 (65 Stat. 726) which amended 28 USC § 1291 to provide that the Ninth Circuit hear *all* appeals from the District Court of Guam, regardless of the amount in controversy. Prior to that time, the Ninth Circuit had jurisdiction to hear only certain appeals from the District Court of Guam. (See *Corn v. Guam Coral Co.,* 318 F.2d 622, 624 (1963)).

A situation was created similar to that existing now where an act of the Guam Legislature created a void in the federal law which Congress *later* filled as soon as the need was made known. It is recognized that a void exists if this court upholds the power of the Legislature of Guam to enact the law under review here. However, Congress may, and no doubt will, act to fill that void as soon as it knows precisely how existing law is interpreted and what the void is that it must fill. Until a final resolution of this case, Congress cannot know in what manner it must fill the void of its relationship between the local courts and the United States Court system. Nowhere does Petitioner advocate a total separation of the local courts of Guam from the Article III courts of the United States.

Again in 1958, a void appeared in that, because of the extensive appellate jurisdiction exercised by the Appellate Division of the District Court, it became necessary to amend the Organic Act again so that judges more knowledgeable of the local situation and more accessible to it, would be appointed to sit on the Appellate Division of the District Court. (In

1958, before the advent of jet transportation, Hawaii was still over twelve hours flying from Guam and the West Coast was in excess of 24 hours flying time from Guam.) In commenting upon this change, the Ninth Circuit in *Corn* (supra, p. 627) noted that the Appellate Division was originally a creation of the Guam Legislature "in response to which section 1291 was amended."

> "Congress, in enacting Public Law 85-444, 72 Stat. 178-179, 1958, 42 USC §1424(a), as amended was . . . recognizing and making suitable procedural provisions for the Appellate Division of the District Court as it now exists under the local law." S. Rept. No. 1582, 85th Cong. 2d Sess. 1958, 1958 U.S. Code Cong. & Adm. News, page 2623.
>
> "Thus, instead of purporting to create a new appellate body, Congress in 1958 was only formalizing the procedural means by which the District Court should exercise its theretofore existing appellate jurisdiction, jurisdiction which antedated the amendment to 28 USC 1291." *(Corn,* supra, at page 627).

There have been no further amendments to the judiciary portion of the Organic Act to the present time. However, the same is not true of the remainder of the Organic Act. In 1970 Congress, in response to the request of the people of this territory, amended the Organic Act to provide for an elected governor. (See Public Law 90-497, 82 Stat. 842.)

The applicability of the Internal Revenue Code to Guam has caused similar and considerable action by Congress in *reaction to* various problems which

have surfaced *from time to time* because of the initial writing of the provisions. Because of numerous lawsuits, subsections (b) through (h) have been added to the Organic Act to supplement 48 USC 1421(i)(a). Because of still further inequities caused by Congress's adopting the "mirror image" of the Internal Revenue Code as the Guam Territorial Income Tax, Public Law 92-606 was passed eliminating many of the inequities, but again as a result of the observation of the operation of the system. (See Legistive History Public Law 92-606, 3 U.S. Code Cong. & Adm. News—'72, pp. 5401-5409).

Therefore, it is evident that the Ninth Circuit was in error when it observed that Guam lacked the authority to create a Supreme Court of Guam because Congress had not acted first to provide some form of relationship between the courts of Guam created by the Court Reorganization Act. (Public Law 12-85, 12th Guam Legislature, 1974; see A-8, Petitioner's Petition for Writ of Certiorari, but *note* that on page A-11 of Petition, 3rd paragraph, the reference to Public Law 12-85 should read "Public Law 12-189".) and the courts of the United States created under Article III of the Constitution. The whole response of Congress to needs on Guam has been one of reaction, rather than anticipation. Therefore, where the plain language of the Organic Act allows action by the Legislature of Guam, as it does in 48 USC 1424(a), this court should uphold its power and allow Congress to react in whatever way it sees fit. This court should not require that Congress first anticipate the actions

of the Guam Legislature, before the Legislature can act.

III

THE NINTH CIRCUIT ERRONEOUSLY ASSUMED THAT PUBLIC LAW 85-444, IN AMENDING 48 USC 1424(a), REPEALED BY IMPLICATION PUBLIC LAW 17 OF THE FIRST GUAM LEGISLATURE AND SUBSTITUTED FEDERAL LAW IN ITS PLACE.

The wording of 48 USC 1424(a) as enacted August 1, 1950 allowed the Guam Legislature to create an appellate system for the Courts of Guam and to determine the jurisdiction of that system. Thus, the Guam Legislature in P.L. 17 was able to establish that such appeals were to be determined through the medium of an Appellate Division of the District Court of Guam. This legislative power was not removed by the 1958 amendment to 48 USC 1424(a) set out in Public Law 85-444. Rather, P.L. 85-444 merely provided that the District Court of Guam shall have jurisdiction in all causes arising under the Constitution, treaties, and laws of the United States, regardless of the sum or value of the matter in controversy and inserted a paragraph requiring that appeals to the District Court be heard and determined by an appellate division. Remaining completely intact is the statutory language which originally enabled the Guam legislature to establish an appellate system. " . . . the judicial authority of Guam shall be vested in the District Court of Guam and in such court or courts as may have been or may hereafter be established by the laws of Guam. The District Court of

Guam . . . shall have such appellate jurisdiction as the legislature may determine. The jurisdiction of and the procedure in the courts of Guam other than the District Court of Guam shall be prescribed by the laws of Guam." 48 USC 1424(a). Thus, just as the Guam legislature once properly exercised its authority in P.L. 17 in determining to adjudicate appeals from the Guam courts through an appellate division of the District Court of Guam it may now determine to remove appellate jurisdiction from the District Court and to adjudicate such appeals through another medium such as that established in P.L. 12-85. The paragraph inserted by P.L. 85-444 simply indicates that when appeals are sent to the District Court of Guam they shall be heard and determined by the appellate division of the court. There is, on the other hand, no statutory requirement that appeals from the courts of Guam must be determined by the District Court should the Guam legislature elect to establish another appellate process.

Any purported repeal by P.L. 85-444 of the power granted the Guam legislature to create and determine the jurisdiction of an appellate court system can only be based upon inference. The conclusion that P.L. 85-444 operates as such an implied repeal is supported by neither the facts nor the law. In a class action Non-Indian employees of the Bureau of Indian Affairs challenged preferential employment for qualified Indians in the B.I.A. pursuant to the 1934 Indian Reorganization Act which they contended was implicitly repealed by the Equal Employment Opportunities

Act of 1975, § 11, prohibiting discrimination in most federal employment on the basis of race. Below, the three-judge United States District Court concluded that the latter law implicitly repealed the Indian preference. In rejecting appellee's contention of a silent repeal by the most recent law, the Supreme Court, considering legislative history and federal policy, found that the purpose of the preferences was to give Indians greater participation in their own self-government to carry out the Government's trust obligation toward the Indian tribes, and to reduce the negative effect of having non-Indians administer matters that affect Indian tribal life. The thrust of the Indian Reorganization Act was to establish machinery to enable Indian tribes to assume a greater degree of self-government both politically and economically. There being nothing in the legislative history to indicate affirmatively Congressional intent to repeal the 1934 preference, but rather, ample evidence of contrary legislative intent and the 1934 act being an important component of a longstanding Government program, it was a prototypical case where an adjudication of repeal by implication is not appropriate. The rule that repeals by implication are not favored was directly applicable. *Morton v. Mancari* (1974), 417 U.S. 535, 94 S.Ct. 2474. In the instant case as well as in *Morton* there is nothing to indicate an affirmative showing of an intent to repeal. P.L. 85-444 is not irreconcilable with the establishment of an appellate system for the courts of Guam, and in fact, such a step is consistent with the general impetus toward greater self-government for Guam.

The wording in the 1950 enactment of 48 USC 1424(a), which has allowed the Guam legislature to establish a court system and to determine appellate jurisdiction, has not been changed by P.L. 85-444 despite the P.L. 85-444 amendment. Retention of this wording despite amendment to the section indicates that a silent decision to remove such a power has not been made. In an action to recover damages and for injunctive relief because of a refusal to sell a house in a private subdivision to plaintiff solely because of race, it was held that the Civil Rights Act of 1866 was intended to prohibit all discrimination, private as well as public, in the sale or rental of property and that the scope of the 1866 act was not altered when it was re-enacted in 1870 following the adoption of the Fourteenth Amendment. Re-enactment did not indicate an intent to limit application of the former law to state action. The rule is that repeals by implication are not favored and thus Congress did not make a silent decision in 1870 to exempt private discrimination from the 1866 act. *Jones v. Alfred Mayer Co.* (1968), 392 U.S. 409, 88 S.Ct. 2186.

In the instant case, repeal by implication is not justified by the presence of either clear intent or irreconcilable repugnancy. It is a cardinal rule of statutory construction that repeals by implication are not favored. *Universal Interpretive Shuttle Corp. v. Washington Metropolitan Area Transit Commission* (1968), 393 U.S. 186, 89 S.Ct. 354; *Lynch v. Household Finance Corporation* (1972), 406 U.S. 911, 92 S.Ct. 1611; *United States v. Students Challenging*

Regulatory Agency Procedures (1973), 412 U.S. 669, 93 S.Ct. 2405.

Finally, the appellate system indicated by the Guam Legislature in P.L. 12-85 was actually established and staffed. An extensive alteration in the basic underlying structure of an established program is not to be inferred from ambiguous statutory language which is not clarified by legislative history. *Rosado v. Wyman* (1970), 397 U.S. 397, 90 S.Ct. 1207.

IV

WHERE A STATUTE, SUCH AS 48 USC 1424(a), PROVIDES A CLEAR MEANING, IT IS ERROR TO GO BEHIND THAT CLEAR MEANING TO LOOK FOR LEGISLATIVE INTENT WHICH IS CONTRARY TO SUCH CLEAR MEANING OF THE STATUTE.

As has been shown elsewhere in the Brief, the first paragraph of 48 USC 1424(a) gives to Guam the authority to determine what, if any, jurisdiction over appeals the District Court of Guam is to possess. The Legislature of Guam used this power in Public Law 17, First Guam Legislature, and gave to the District Court extensive appeal jurisdiction.[1] This law was not

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[1]Code of Civil Procedure, Laws of Guam: § 63. Appellate Jurisdiction. The District Court of Guam shall have jurisdiction of appeals from the judgments, orders and decrees of the Island Court in criminal causes as provided in the Penal Code, Part II and Title VIII, and in civil causes and proceedings as provided in the Code of Civil Procedure, Part II and Title VIII, Chapter VI; Article II, and Title 12, Chapters I and II, and Part III, Title I, Chapter V; and Title II, Chapter IV; and Title VII, Chapter 12, and the Probate Code, Division III, Chapter XXI, Article IV and Division IV, Chapter XVI.

§ 65. Appellate Division. Appeals from the Island Court shall be heard and determined by an Appellate Division of the District

changed until the Court Reorganization Act of 1974. At such time, the Legislature determined that it no longer desired the Appellate Division of the District Court to hear appeals from local cases arising in the new Superior Court, a continuation of the Island Court, now having general jurisdiction of all non-federal matters.

This is not in violation of the Organic Act, since the second paragraph of 48 USC 1424(a) addresses itself to procedural matters only. (See *Corn v. Guam Coral Co.,* supra at p. 627.) Thus, Congress in 1958 created no new court by federal law. However, the first paragraph of 48 USC 1424(a) does permit the Legislature to determine what appellate jurisdiction the District Court may have. Unless the Guam Legislature does act, the District Court of Guam will have *no* appellate jurisdiction whatsoever.

It is axiomatic that that which the Legislature may create, it may also repeal. To hold otherwise would be to state that 48 USC 1424(a) actually required the Guam Legislature to take the mandatory action

Court, consisting of three judges, of whom two shall constitute a quorum. The Appellate Division, when requested by the moving party, shall also herein determine motions for rehearing or a new trial made after final decision of the District Court in all cases tried originally in that court in which such final decision is not appealable to the United States Court of Appeals for the Ninth Circuit. The judge appointed for the court by the President shall be the Presiding Judge of the Appellate Division and shall preside therein unless disqualified or otherwise unable to act. The other judges who are to sit in the Appellate Division at any session shall be designated by the Presiding Judge from among the judges assigned to the court from time to time by the Chief Justice of the United States pursuant to § 24a of the Organic Act of Guam (48 USCA 1424(b) . . . (Enacted 1953, U. S. Code reference added by editor.)

that it has, thereby relegating Public Law 17 of the First Guam Legislature to the level of a mere ministerial act. However, such plain language cannot be read in this manner. By Public Law 12-85, the Twelfth Guam Legislature repealed Public Law 17 of the First Guam Legislature and in its stead did precisely what it was permitted to do by the first paragraph of 48 USC 1424(a), namely, declare that the District Court of Guam was to have no appellate jurisdiction and to create additional courts having local jurisdiction, such courts (Supreme Court of Guam) being of equal dignity to the District Court in local matters as is specifically permitted by the first sentence of 48 USC 1424(a).

Statutory interpretation begins with the presumption that a statute under analysis should be accorded its literal meaning. Thus, the rule of law that when a statute uses plain understandable words the court will not subject to further methods of analysis is supported by a long flow of case law. The United States District Court for the Central District of California, confronted with interpreting a federal statute, summarized the law as follows:

> "It is universal that when a statute uses plain understandable words, the court cannot legislate but must interpret the words as they read without any modification. 'It is our judicial function to apply statutes on the basis of what Congress has written, not what Congress might have written.' *United States v. Great Northern Railway Co.,* 343 US 562, 575; 72 S.Ct. 985, 993; 96 L.Ed. 1142 (1952)."

The Ninth Circuit erred in overruling the laws of Guam in that the Ninth Circuit assumed that Congress meant something that it did not state in 48 USC 1424(a), and decided the case on that basis. The fact that Congress did not foresee and include some provision for the relationships between an Article III and the Supreme Court of Guam, does not mean that Congress failed to give the Legislature of Guam the power to create such a court apart from the District Court of Guam by the plain words of the statute. This is well explained by the majority of the panel of the Ninth Circuit which considered *Agana Bay Development Co. (Hongkong) Ltd. v. Supreme Court of Guam,* 529 F.2d 952.

Likewise, that decision explained the comparison between the Organic Act of Guam which gives the Legislature of Guam great powers over the jurisdiction of its courts, and that of other territories in the past which were given limited, or no powers, to change the jurisdiction of their territorial courts—all of which was accomplished by the plain words of the Organic Act in question. The dissent in the *Agana Bay* case, which was adopted by the majority of the court in the instant case, is in serious error when it relies upon the fact that no appeal to an Article III court would occur under the new Court Reorganization Act before Congress may act, as a basis for invalidating the Supreme Court of Guam. If the Legislature determined, as it may under 48 USC § 1424(a), that no, or very few appeals may be taken to the District Court, then the same result would

occur as complained of by the Ninth Circuit. (See page A-2, Petition for Writ.) The Guam Legislature is the only body which may determine the appellate jurisdiction of the District Court.

V

THIS COURT HAS RULED PREVIOUSLY THAT CONGRESS MAY PERMIT TERRITORIAL COURTS TO EXERCISE ANY JURISDICTION WHICH CONGRESS COULD PLACE IN A FEDERAL COURT FOR A TERRITORY.

This Court has previously ruled that the jurisdiction of a territorial court is concurrent with that of the Federal District Court of that Territory, unless Congress has made that federal jurisdiction exclusive. *(The American Ocean Ins. Co. v. 356 Bales of Cotton),* 1 Peters 511, 7 L.Ed. 242, 255). This Court found that the "judicial authority of the territory [of Florida]" was given equally to the superior and inferior courts, even though the Florida Territorial Legislature could create only inferior courts. A similar case applies to the Territory of Guam except that here the Congress did not limit the Legislature of Guam to creating "inferior" courts. The judicial authority of Guam is given equally to the District Court and whatever courts the territory of Guam may establish. The only exclusive jurisdiction that is given applies to cases arising under the constitution, laws and treaties of the United States and to cases arising on account of the operation of the Guam Territorial Income Tax.

Therefore, this Court has already found that there is no hindrance to the Legislature of the territory acting to create jurisdiction in a court of its own making unless the Congress has specifically carved out an exclusive jurisdiction in a District Court, or other court created by the Congress. Congress has not done so here. There is no reason to alter that opinion in the case of the Territory of Guam.

VI

THAT THE POWER TO CREATE A SUPREME COURT OF GUAM IS NOT DENIED BY THE WORDING OF THE ORGANIC ACT OF GUAM, IN A COMPARISON WITH SIMILAR POWERS GIVEN TO THE COMMONWEALTH OF THE NORTHERN MARIANAS.

The United States, in the "Covenant to establish a Commonwealth of the Northern Marianas in political union with the United States of America", has, in its grant of jurisdiction to the future courts of the Commonwealth of the Northern Marianas, established their powers with wording almost identical to that which grants jurisdiction to the District and Territorial courts of Guam. Such grant of jurisdiction is now contained in Public Law 94-241 (90 Stat. 266, 267). (See pages 3-6 of this Brief.) That grant of jurisdiction establishes a District Court for the Northern Marianas having identical jurisdiction to the District Court of Guam. It will have original jurisdiction in all causes arising under the Constitution, treaties or laws of the United States regardless of the sum or value in controversy; it will have

original jurisdiction in all causes "over which is not vested by the constitution or laws of the Northern Mariana Islands in a court or courts of the Northern Mariana Islands." (90 Stat. 266.) Further, the District Court of the Northern Marianas will have such appellate jurisdiction "as the constitution or laws of the Northern Mariana Islands may provide." (90 Stat. 267.) Section 403 continues and establishes the relationship between these courts and the courts established by the United States. Because this covenant was the result of the negotiations between the parties which have had more than 25 years of experience since Guam's Organic Act which enabled them to see where Guam is at this time, the relationships between the local and federal courts were established. However, it is evident that Congress did not have such 25-year foresight in 1950, or even in 1958. However, by using identical language in the *Covenant,* it is evident that Congress and the President intended that the jurisdiction be the same. There is no indication that the powers of the Legislature of Guam should be any different from those given to the Commonwealth of the Northern Marianas when identical language is contained in each "organic" act.

The intent of this portion of the *Covenant* is contained in the official history of the negotiation of that document. (Page A-6, 7 of the Petition for Writ of Certiorari.) In this History it was clearly established that the Legislature of the Northern Marianas "be under no obligation to grant any appellate jurisdiction to the District Court for the Northern Mariana

Islands. The Legislature may choose at any time and from time to time to establish Appellate Courts of the Northern Mariana Islands and to eliminate or reinstate the appellate jurisdiction of the District Court." The entire suit before this court involves the power of the Legislature of Guam to accomplish the same ends as are provided for an identical grant of power to the future Commonwealth of the Northern Mariana Islands. Surely, it cannot be said that Congress, in using the same language, intended to be more restrictive in dealing with Guam than in dealing with the future Commonwealth of the Northern Marianas. In view of the history of the negotiations, it is evident that the parties to those negotiations (which did not include Guam, even as an observer) intended that the jurisdiction of the territorial courts of the Commonwealth have as broad a power as could be given them and in so determining believed that the language used in the Organic Act of Guam would give them such power. If the Court is to decide that Guam does not possess such power, then such power cannot be possessed despite the plain wording, by the Commonwealth of the Northern Marianas.

VII

THE INTERPRETATION URGED BY PETITIONER IS NOT IN CONFLICT WITH THE ENTIRE ORGANIC ACT OF GUAM, WHICH IS ACTUALLY A "SCAFFOLDING" WHICH ESTABLISHED A FRAME OF GOVERNMENT AND PERMITS THE TERRITORY TO ALTER THAT AS THE SITUATION WARRANTS.

The Petitioners are not asking this Court to interpret 48 USC 1424(a) in a manner more liberal than similar grants given to the Legislature and Executive throughout the remainder of the Organic Act of Guam. For instance, instead of providing a definite power of appointment such as is contained in Article II, Clause II, paragraph 2 of the United States Constitution, the Organic Act of Guam allows the Governor to appoint and remove all officers and employees of the Executive Branch "except as otherwise provided in this or any other act of Congress *or under the laws of Guam, . . .*" (48 USC 1422, para. 5) Likewise, unlike the constitution of many states which limit the Legislature in the enactment of bills to bills having one subject (see §19, Constitution of Indiana, 1 Burns Indiana Statutes Annotated), the Organic Act of Guam places no restriction whatsoever upon the subject matter of bills which the Legislature may enact, provided they are of local application, nor does it regulate in any manner the adoption of appropriation bills, permitting riders and extraneous matters to be adopted. (See 48 USC 1423(a)) Also, even when it comes to the appointment of heads of executive agencies and instrumentalities, the Governor is given this power "except as

otherwise provided in this chapter *or the laws of Guam,"* (48 USC 1422c(a)). In the case of executive power, the Governor is given a broad power of item veto (48 USC 1423(i), is authorized to execute both the laws of Guam and the laws of the United States applicable in Guam (48 USC 1422, para. 5) and he is given the power to "issue executive orders and regulations not in conflict with any applicable law." (42 USC 1422, para. 6)

Therefore, it can be seen that all three branches of government within the Territory of Guam are given powers in the Organic Act which powers may be changed and amended by the laws of Guam at any time. From this emerges a pattern. Congress established the basic form of government for the territory in 1950. However, in the Organic Act itself, Congress provided for the expansion and creative development of that government by local powers. Thus, the appointment power of the Governor was not fixed by Congress, but was established by Congress and the local legislature given the power to change and amend it wherever and whenever it felt necessary. Likewise, with the respect to the Governor's powers to issue executive orders and regulations, Congress gave him great leeway to fill in voids where the Legislature had not acted or had acted inconsistently. Similarly, Congress gave to the Legislature of Guam the broadest power (within the area of local application) to enact whatever legislation it deemed fit. Congress did not impose upon that body the limitations that the people of the several states normally place upon their

legislatures as a result of the long experience of the states. That long experience was left to be developed by the people of Guam.

It is the position of the Petitioner that a similar interpretation should be applied to the court system of Guam. The courts were established initially by the Congress so that Guam had a complete governmental system in 1950. However, Congress, realizing that the courts would develop along with the rest of the government, permitted the Legislature of Guam to develop and change the court system as the needs changed. Therefore, it is not contrary to the intent of Congress as expressed in the Organic Act itself to permit the Legislature of Guam to create a Supreme Court of Guam if the Legislature deems that such a court is necessary in the territory.

CONCLUSION

Therefore, the Petitioner prays that this Court reverse the ruling of the Ninth Circuit Court of Appeals which held that Guam had no authority to create its own Supreme Court having appellate jurisdiction over matters of the Superior Court of Guam. The Petitioner prays that this Court declare that the Organic Act of Guam, specifically 48 USC 1422(a), grants to the Territory of Guam sufficient powers of self-government to determine whether the District Court of Guam shall hear appeals from the Superior

Court or whether a locally-created Supreme Court of Guam shall hear such appeals.

The Petitioner has shown that neither the legislative history of the Organic Act, the history of a similar enactment applicable to the Commonwealth of the Northern Marianas, nor rulings of this Court would indicate anything other than the fact that 48 USC 1422(a) gives to the Legislature of Guam the power to create its own Supreme Court under the wording of such section as it has been enacted with respect to Guam.

Therefore, Petitioner urges that this Court reverse the opinion of the Ninth Circuit Court of Appeals in the instant case.

Dated, Agana, Guam,
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